United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-4242

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CASE NO. 75-4242

NATIONAL LABOR RELATIONS BOARD

Petitioner

vs.

GENERAL IRON CORP.

Respondent

CROSS PETITION

FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

B
P/S

BRIEF FOR GENERAL IRON CORP.

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STATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the company violated Section 8(a)(1) of the Act?

2. Whether substantial evidence on the record as a whole supports the Board's conclusion that an apparent antagonism existed between the interests of the discriminatees on the one hand and Local 840 and the company on the other so as to preclude the necessity of deferring to the arbitrator's decision under the Spielberg doctrine?

3. Whether substantial evidence on the record as a whole supports the Board's finding that the company laid off employees Bailey, Carrion, Escalera, Gonzales, Reyes and Agosto, and discharged employees Pieretti and Vilcius in violation of Section 8(a)(3).

COUNTER STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board (hereinafter, the Board) pursuant to Section 10(e) of the National Labor Relations Act, as amended, for enforcement of its Order and by the cross petition for review of the Board's Order by General Iron Corp. pursuant to Section 10(f) of the National Labor Relations Act, as amended.

STATEMENT OF THE FACTS

In August of 1971, the employees of General Iron had recognized Local 840 as the exclusive representative of its production and maintenance employees and had entered into a three year collective bargaining agreement with an expiration date of August 22, 1974. Around May of 1974, Local 455 commenced an organizational drive at Respondent-Employers plant, in an attempt to usurp Local 840 as the bargaining representative of the employees (A. 100).

On or about May 10, 1974, Tony Shifano of Local 455 gave LeRoy Howard, an employee of General Iron and the Shop Steward, authorization cards to distribute (A. 101). Howard in turn gave some cards to Jose Pieretti to distribute to the Spanish employees (A. 123). Both Howard and Pieretti testified that the cards were given out in the morning before work or during the breaks (A. 124). Both men stated that the bosses did not see them distribute or collect the cards (A. 118) Both Henry and Mario Accarino stated that they were unaware of Local 455's organizational activity until May 23 when that union made a demand for recognition (A. 170). All totalled there were some 21 employees who signed cards for Local 455.

After Memorial Day, both Howard and Pieretti related that they had discussions with the employer regarding Local 455. Howard claimed that Henry Accarino told him to stop influencing

employees in favor of Local 455, and that he would shut the plant down rather than accept that Local (A. 107). However, Howard was unable to recall even an approximate date for the making of such a declaration. Moreover, despite the inference that the employer was aware of Howard's union activities, he was soon promoted to foreman (A. 111).

Jose Pieretti also testified that Henry Accarino told him that he didn't want problems, that unions gave him problems and that he preferred Local 840 (A. 131). Pieretti also related that Mario Accarino told him, after he had given testimony before the Board, "I know where you was, and next time I fire you" (A. 137). However, there was no proof offered to demonstrate that Mario Accarino did know where Pieretti was or that he would fire Pieretti or any other man for giving a statement.

By way of contrast, Henry Accarino firmly denied making either of the statements attributed to him by Howard and Pieretti. He stated that he never threatened to close the plant, never refused to bargain with Local 455, never threatened reprisals against employees and never discouraged support for Local 455 (A. 203). Mario Accarino likewise stated that he never threatened employees for supporting Local 455, and never made the statement attributed to him by Pieretti (A. 175). More importantly, both Accarinos stated that they had no knowledge

of which employees signed cards for Local 455 until the November 1974 hearing date (A. 204).

Prior to and during Local 455's attempt to usurp the representative power of Local 840, General Iron was undergoing a change in production. In March, April and early May, the company was developing a new line which resulted in an increase in employees (A. 172). However, on May 20, their sales representative informed them to stop all shipments until mid June because of limitations which had developed in the buying power of department stores (A. 173). This of course necessitated a reduction in the work force. Although both Accarinos put off a decision to lay off workers as long as possible, by May 28 they had no choice. Luis Escalera and Carlos Gonzales were laid off on that date. On May 29, Manuel Sanchez, Jose Carrion and Enrique Pellot Reyes were laid off. On the following date Charles Bailey was laid off (A. 187-188). All six employees were recent additions to the work force and were laid off primarily on the basis of seniority (A. 174). By early June, as the sales representative had predicted, business picked up and all six men were offered reinstatement (A. 174). However, only one employee, Jose Carrion returned to work (A. 191).

In early June, problems developed with Marcellus Vilcius, a recent employee who was hired despite the fact that he spoke no English and could understand no one (A. 95). He

was given two extremely simple jobs both of which he failed to perform properly. As to the first job, Henry Accarino advised that Vilcius continually complained that the machine was no good and had to be periodically reinstructed (A. 182-183). After receiving a number of complaints about Vilcius from the other employees, Accarino transferred him to another machine used for the bending of handles (A. 176). However, he proceeded to make a costly error on that assignment too when he co-mingled barrels of the handles with precounted boxes previously placed in the shipping department (A. 184). Aside from the mistake resulting in a recounting of some 10,000 handles, it also demonstrated to the employer that the language barrier was causing too many problems and might one day result in an injury to another employee (A. 187). As a result of the above Vilcius was discharged on June 5.

Over the past year problems also developed with respect to Jose Pieretti whose fear of machines ultimately lead to his discharge. Although he was employed since 1971, he never mastered the operation of the various spot welding machines in the plant, although they were essentially the same (A. 192). In May of 1974 when a previous job he was working on was completed, he was transferred to a new job welding slack racks on a different machine. Although new employees with less experience were producing 60 or 70 racks per hour,

Pieretti could only weld 10 to 12, 5 or 6 of which were defective (A. 197). Accarino's suggestions to choose a machine he was comfortable with and to wear glasses went unheeded. After three days, Accarino could no longer afford to keep him on that job, and he was transferred to another (A. 198). Pieretti could not perform on that job either, and when a co-employee complained, he was removed from that job as well (A. 198). Finally, Henry Accarino called Pieretti into his office and asked him what the problem was, suspecting that Pieretti wanted to be laid off so as to collect unemployment (A. 199). It was at this point that Pieretti confided his fear of machines despite the fact that there was no history of injuries with plant machines (A. 192-193). Although Accarino considered discharging Pieretti at that time, he agreed not to do so. However, approximately one month later, when Pieretti took two days off without telling Accarino, the employer felt compelled to discharge him (A. 200).

Thereafter, on September 27, 1974, an arbitration hearing was held pursuant to grievances filed by Local 840 alleging that the aforementioned eight employees were terminated for union activity. The arbitrator found the facts to be essentially as described above and held that the employees were properly discharged and laid off for cause. No decision was made regarding Marcellus Vilcius since he was offered

reinstatement on the basis of his representation that he was now attending school to learn English.

Despite the arbitrator's findings, a complaint was issued on September 30, 1974 by the National Labor Relations Board pursuant to charges filed on August 5 and 16 by Local 455. As a result of a hearing held on November 20, 21, December 2, 3 and 4, Administrative Law Judge Henry Jalette concluded that the employer had violated Sections 8(a)(1) and (3) of the Act and ordered the employees reinstated. The Board affirmed the Administrative Law Judge's ruling.

POINT I

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT IN THE ONE INSTANCE DESCRIBED BY LEROY HOWARD AND THE THREE INSTANCES DESCRIBED BY JOSE PIERETTI.

The Board held that the company violated Section 8(a)(1) of the Act as a result of one comment Henry Accarino purportedly made to LeRoy Howard, two comments he made to Jose Pieretti and one comment which Mario Accarino purportedly made to Jose Pieretti. As admitted by the Administrative Law Judge, the sole evidence introduced to support these comments was the testimony of each of the recipients. Each only testified as to the instance in which he was involved. The result is that the four 8(a)(1) violations were based on the single, self serving totally uncorroborated statements of the two witnesses. Discrepancies in their individual testimony and denials by the Accarinos, and in some instances, by General Counsel witnesses were found insufficient to preclude the Board's adoption of the Administrative Law Judge's findings.

However, it is well settled that the Court of Appeals may decline to follow the action of the examiner in crediting and discrediting testimony even though the Board may have accepted the Judge's findings. In point of fact the Court is not barred from setting aside the Board's decision, if it cannot conscientiously find that the evidence supporting it is

substantial. N.L.R.B. VS. MONROE AUTOMOBILE EQUIPMENT CO. 392 F2d 559 (C.A. 5, 1968); PORTABLE ELECTRIC TOOLS INC. VS. N.L.R.B. 309 F2d 423 (C.A. 7, 1962). More importantly, in deciding whether the evidence supporting it is substantial, that evidence must be viewed "in the light that the record in its entirety furnishes including the body of evidence opposed to the Board's view". UNIVERSAL CAMERA CORP. VS. N.L.R.B. 340 U.S. 474 (1950). Thus the damaging evidence cannot be viewed in a vacuum, and as stated by Justice Frankfurter, "must do more than create mere suspicion". When the limited evidence of General Counsel is viewed in this manner, it becomes clear that the company is not guilty of any 8(a)(1) violations.

LeRoy Howard testified that Henry Accarino once told him to leave Local 455 alone and stop influencing employee preferences. He related that Henry Accarino stated he would close the shop rather than bargain with that union (A. 107). Henry Accarino testified that he never threatened to close the plant, never warned anyone not to support Local 455 and indeed never even had a conversation with Howard on the subject (A. 202-203). Cross-exmiration did little to discredit this denial.

In contrast, Howard's recollection must be deemed suspect. He could not relate even the approximate date of

this supposed occurence.[1] His statement was totally self serving and consistent with his extensive support for Local 455.[2] His recollection finds no corroboration anywhere else in the record. Most importantly, however, the alleged employer threats and coercion are totally inconsistent with the company's promotion of Howard in May 1974. If they viewed with anger his activity in support of Local 455 as Howard alleged, why would they promote him? Viewing the record as a whole, it is difficult to comprehend how the existence of such a comment can be found to be supported by substantial credible evidence.

Next, employee Jose Pieretti testified and attributed two comments to Henry Accarino and one to Mario Accarino, all found violative of Section 8(a)(1). He testified that on May 28, Henry Accarino told him that 1) he didn't want any problems with the unions, 2) unions give him trouble, 3) he could fire everyone, and 4) Local 840 would have to stay (A. 14). Once again, the statement was totally self serving given Pieretti's favoritism to Local 455[3] and is totally uncorroborated.

1/ Perhaps this was by design rather than by a failure to recall. Since Mario Accarino and Jose Pieretti testified that Henry Accarino's knowledge of Local 455's presence occurred as a result of the May 23 demand for recognition, any assignment of a prior date to the statement would present a conflict and raise questions as to the credibility of Howard's testimony.

2/ Howard not only solicited cards for the union, but was responsible for bringing Local 455 to the plant.

3/ Pieretti solicited Local 455 cards to the Spanish speaking employees.

Moreover, as indicated above, Henry Accarino totally denied restraining employees from joining or supporting Local 455 and denied threatening discharge for such support (A. 203). Thus, the evidence was hardly substantial.

Furthermore, even if such a statement was made by Henry Accarino, it is not violative of Section 8(a)(1) of the Act. The alleged quote-"I don't want any problems"- is relatively innocuous. It represents merely that type of anti-union hostility to be expected during the course of an organization drive which is not violative of the Act. FORT SMITH BROADCASTING CO. VS. N.L.R.B. 341 F2d 874 (C.A. ARK, 1968). Indeed, the statement is more a reflection on the labor-management facts of life than on any antagonism directed at Local 455.

In addition, an employer's statement which does not reach the level of an outright threat must be construed by the employee himself as being coercive before it can be found violative of the Act. N.L.R.B. VS. ROLLINS TELECASTING INC. 494 F2d 80 (C.A. 2, 1974). Thus, Henry Accarino's expressed preference for Local 840, and his statement that he could fire everyone must be shown to have affected or restrained Pieretti's support for Local 455. The record demonstrates just the opposite. Pieretti continued his support and testified for the union in July 1974 before the Board. Thus any

conclusion that Pieretti was affected by the comment, it totally speculative.

It was next found by the Board that certain comments made to Pieretti by Henry Accarino in his office on May 30 were violative of Section 8(a)(1). Although Pieretti had performed satisfactorily on the job prior to the Spring of 1974, from that point on he began to experience difficulty. He made considerable mistakes despite employer attempts to give him easier assignments on machines of his choice. Finally Henry Accarino called him in believing that the change of quality of Pieretti's work was intentional and motivated by a desire to be laid off so that he could collect unemployment. Henry Accarino asked him if he wanted to be laid off (A. 129). The company asserts that this was the only reason for asking the question. The Board concluded that the question was intended to threaten discharge for the employee's union activity. Such a conclusion by the Board was totally speculative based on the evidence presented. The evidence could just as properly give rise to an innocuous motivation for the incident as it could to a culpable motivation.

Lastly, much is made of the comment made to Pieretti by Mario Accarino the day following the employee's testimony before the Board. Mario Accarino supposedly told Pieretti - "the next time you ask for a day

off, I'm going to fire you, cause I know where you was" (A. 16). The Board found that the comment constituted a threat of discharge and improper surveillance in violation of Section 8(a)(1) of the Act. Once again this conclusion was reached despite the self serving nature of the statement, the lack of corroboration and a firm denial by Mario Accarino.

Nevertheless, even if we assume that the statement was made, substantial evidence on the record as a whole does not exist to support a finding of 8(a)(1) violations. The record is totally void of any evidence that the comment was motivated by Mario Accarino's actual knowledge of Pieretti's whereabouts. There is no proof of unlawful motivation, which is a necessary prerequisite, NATIONAL CASH REGISTER CO. VS. N.L.R.B. 466 F2d 945 (C.A. 6, 1972). Pieretti never told the Accarinos why he wanted the day off and no proof exists that Mario Accarino knew of the date of the hearing. Mario Accarino may have been just as motivated to make the statement because of a non-union reason as a union related reason. Under such circumstances, the Board's findings are speculative and based merely on suspicion. Accordingly, they must be reversed. C.F. EL PASO NATIONAL GAS CO. 193 N.L.R.B. No. 50, JOHN C. MANDEL BUREAU INC. 202 N.L.R.B. No. 25.

In essence then, the findings of 8(a)(1) violations were based on speculation and suspicion rather than on substantial credible evidence required by law.

POINT II

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S ADOPTION OF THE ADMINISTRATIVE LAW JUDGE'S CONCLUSION THAT AN APPARENT ANTAGONISM EXISTED BETWEEN THE INTERESTS OF THE DISCRIMINATEES ON THE ONE HAND AND LOCAL 840 AND THE COMPANY ON THE OTHER. ACCORDINGLY, THE BOARD SHOULD HAVE DEFERRED TO THE ARBITRATOR'S DECISION THAT THE EMPLOYEES WERE LAID OFF AND DISCHARGED FOR GOOD CAUSE AND NOT BECAUSE OF ANY UNION ACTIVITY.

On May 28, 1974, Luis Escalera and Carlos Gonzales were laid off. The Following day Jose Carrion, Enrique Pellot Reyes and Manuel Sanchez Agosto were laid off. Charles Bailey was laid off on May 30. The employments of Marcellus Vilcius and Jose Pieretti were terminated on June 5 and July 29 respectively (A. 20). The company attributed the layoffs to a work slow down and the firings to the employees' inability to perform their jobs.

The collective bargaining agreement in effect between the company and Local 840 provided for arbitration of grievances. Although none of the employees saw fit to file grievances, Local 840 initiated the arbitration process on their behalf contending that they were terminated because of their activity in support of Local 455. None of the alleged discriminatees showed up at the September 5 arbitration hearing. The arbitrator adjourned the matter to September 27. Local 840 sent out notices to the employees. The letters sent to Gonzales, Pellot, Escalera and Bailey were returned.

Although, Pieretti, Vilcius and Sanchez received their notices, only Vilcius showed up. Carrion had returned to work on August 13 and was discharged for good cause on September 20.

At the arbitration hearing Vilcius was reinstated. The arbitrator then concluded that Pieretti was dismissed for good cause, and the other employees were laid off consistent with the collective bargaining agreement since they were probationary employees. No doubt the lack of presence, cooperation and advise of the discriminatees to Local 840 contributed heavily to the dismissal of their claims.

Despite the resolution of the issue of the terminations of these employees by the arbitrator, the Board adopted the conclusions of the Administrative Law Judge and refused to give deference to that decision. They cast aside the regularity and due process safeguards present in the arbitration proceeding and concluded that it was impossible for the arbitrator to render a fair decision here because of an antagonism which they found between the discriminatees and Local 840.

Although the Board has the jursidiction to determine issues initially resolved by the arbitration process, it is well settled that deference to the arbitrator's decision should normally be accorded. CAREY VS. WESTINGHOUSE ELECTRIC CORP. 375 U.S. 261 (1964). The line of cases extending from SPIELBERG MANUFACTURING CO. 112 N.L.R.B. 1080 (1955) through RAMSEY VS.

N.L.R.B. 327 F2d 784 (C.A. 7, 1964) to TIME D.C., INC. VS. N.L.R.B. 504 F2d 294 (C.A. 5, 1974) all consistently hold that where the proceedings appear to have been fair and regular, untainted by fraud, collusion, serious procedural irregularities or repugnent to the purposes of the Act, the Board should defer to the arbitration decision.

The aforementioned cases dictate the approach which the Board and Courts should take in viewing arbitration decisions. The presumption is that deference will be accorded and the burden of irregularity falls upon those seeking to deny its acceptance. To be sure, existent antagonism between the interests of the discriminatees and the union constitutes a sufficient basis to preclude deference. KANSAS MEAT PACKERS 148 N.L.R.B. No. 2 (1972); N.L.R.B. VS. HORN & HARDART CO. 439 F2d 674 (C.A. 2, 1971). However, because of judicial confidence in the ability of the arbitration process to fairly and equitably resolve the issues presented, the burden of proving such antagonism must be satisfied by clear and convincing evidence UNITED STEELWORKERS VS. WARRIOR & G. NAV. CO. 363 U.S. 1409 (1960).

Respondent-employer contends that the Board and General Counsel have failed to distinguish between the lawful right to refuse deference because of such antagonism and the actual existence of clear and convincing proof of such antagonism. A careful review of the record in its entirety demonstrates

that no substantial evidence of such antagonism between the six employees and Local 840 exists. To be sure, the potentiality of such antagonism exists where an incumbent union's collective bargaining agreement will not be renewed because of employee support for another union. However, this does not mean that it existed between Pieretti, Sanchez, Escalera, Gonzales, Reyes, Bailey and Local 840.

There is no proof in the record of hostility between the terminated employees and Local 840. Except for Pieretti, Local 840 had no way of knowing whether the five laid off employees (Carrion returned to work in August) even supported Local 455. With 25 employees in the unit, these five could just as easily have been Local 840 supporters. The record, more properly shows that Local 840 did everything in its power to advance the grievances of these employees in the face of a total lack of cooperation on the discriminatees part. Indeed, it was Local 840 and not the employees who filed the grievances. Despite notices, none of the discriminatees showed up on September 5. Although Local 840 sent out notices of the September 27 date, only Vilcius came. Pieretti and Sanchez specifically stayed away. Insofar as the four returned letters are concerned, the letters themselves demonstrate the union's desire to reach them. Where a change of address exists, it seems more proper for the client or discriminatee to let his

proponent know where he is moving than to put the onus on the union to attempt to track him down. Finally, Nuchow's failure to realize that Vilcius spoke French and not Spanish would seem to be an excusable mistake under the circumstances.

The substantial evidence on the record, in actuality, demonstrates that the arbitrator's decision was based on inadequate preparation cause by the discriminatees failure to help Local 840 aid them and not by any antagonism or polarization between them. In these circumstances, the negligent employees themselves must bear the onus for the union's failure to present evidence on their behalf. Furthermore, any attempt to infer that Local 840 antagonism is proven by the employees indifferene represents pure speculation and is far from being clear and convincing. Under the circumstances of the case at bar, deference should have been accorded to the arbitrator's decision based as it was on the lack of incriminating evidence presented to him by the union. ELECTRONIC REPRODUCTION SERVICE 213 N.L.R.B. No. 110.

POINT III

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDINGS THAT THE EMPLOYER LAY OFFS OF BAILEY, CARRION, ESCALERA, GONZALES, REYES AND AGOSTO AND THE DISCHARGES OF VILCIUS AND PIERETTI WERE VIOLATIVE OF SECTION 8(a)(3) OF THE ACT.

In the event this Court does not find that the Board erred in failing to defer to the arbitrator's resolution of these issues, Respondent-employer asserts that nevertheless substantial evidence does not exist on the record to support any conclusion of 8(a)(3) violations. As indicated in Point I of this Brief, the Court of Appeals may decline to follow the Board's resolution of the credibility issues, if they cannot conscientiously find that the evidence supporting it is substantial. N.L.R.B. VS. MONROE AUTOMOBILE EQUIPMENT, supra. Thus, if, after reviewing the entire record and considering the evidence opposed to the Board's conclusion, the Court finds that General Counsel's evidence creates no more than a suspicion of violative conduct, the Board's finding can be reversed. Respondent-employer asserts that such a review reveals that the Board's conclusions are based more on speculation and suspicion than on substantial credible evidence.

COMPANY KNOWLEDGE

There is no direct proof that the employer knew of the union preferences of any of the eight employees involved. Furthermore, the circumstantial evidence presented is extremely

tenious. Much weight is attached to the fact that Henry Accarino was in the plant a substantial portion of each work day (A. 175) and thus must have known which employees signed the cards for Local 455. Yet Pieretii, Howard and Vilcius all testified that "no boss ever saw them handing out cards or talking to anyone from Local 455" (A. 118). In fact, Vilcius couldn't speak English thus making it impossible for Henry Accarino to know what he was talking about. Moreover, Henry and Mario Accarino specifically denied any such knowledge. Clearly then, any inference drawn concerning company knowledge on the basis of Henry Accarino's presence in the shop is purely speculative.

The same can be said for the testimony regarding the vote taken by Nuchow. The inference is made that since Nuchow took a vote of employee preferences and know which workers favored Local 455, he must have automatically imparted such knowledge to the employer. Once again this is idle speculation unsupported anywhere in the record.

Without specific proof of employer knowledge as to the preference of each of the eight workers, 8(a)(3) violations can only be based on a combination of circumstantial factors which collectively demonstrate company knowledge. There must be substantial credible evidence on the record which proves 1) knowledge of general union activity, 2) employer animus toward Local 455, 3) questionable timing of layoffs and discharges

and 4) pretexturous reasoning assigned by the employer for the terminations. N.L.R.B. VS. PIEZO MANUFACTURING CORP. 290 F2d 455 (C.A. 2, 1961). Only with satisfactory proof of all four factors can the inferences be made that the terminations were intended to discourage employee support for Local 455. In point of fact, no such proof exists with respect to three out of the four prerequisites.

The employer does not dispute that he had knowledge of general union activity in late May of 1974 by virtue of Local 455's demand for recognition on May 23. However, in a unit of 25 employees, he did not know which employees favored which union. Moreover, the employer had no specific animus toward Local 455, and no such evidence has been advanced, save Henry Accarino's general comments to Jose Pieretti. These comments, however, consisted of nothing more than a concern over the effect of unions in general and can be dismissed as innocuous statements which generally accompany an organizational drive (see Point I). The comments did not make any direct reference to Local 455.

The key to the resolution of the 8(a)(3) issues, however, revolve around the reasoning ascribed to the terminations by the employer. Unless the proof is substantial that the reasoning was pretexturous, and the timing overly suggestive, no 8(a)(3) violations can be found. Once again, no such

satisfactory proof exists.

THE LAYOFFS

The chronology of events reveals that the company developed a new line in March, April and early May which necessitated an increase in the work force. The six laid off employees were hired at that time for that reason. Thereafter, in mid-May 1974, the employer received a call from its sales representative requesting them to hold up further shipments until mid-June because of limitations in buying power. This information was verified in a letter to the company received May 20 (A. 67). However, rather than hurting the employees unnecessarily, the Respondent carefully considered its alternatives and made no lay offs until May 28 when Escalera and Gonzales were so informed. The following day, the company felt compelled to lay three more employees off and on May 30, Bailey was advised of the lay offs (A. 173-174). However, as soon as June began and the prognostications of the sales representative proved true, all six men were re-called during the first few days of the month (A. 174).

The sequence described above, and the reason ascribed therefore were all reasonable under the circumstances. They demonstrate employer concern over a loss of work for its men, rather than a desire to terminate for union activity. If union activity was the motivating force, why not lay the men off on

May 23, the date of the demand for recognition, or the following date? Is it not just as reasonable to infer that no lay offs were made until May 29 because of employer reluctance to hurt the men rather than because of union activity? Why not lay off all six at the same time? Does not the staggering of the layoffs and the immediate recalling more properly show employer motivation to cause as little economic loss as possible to the men? The important point to be considered here is that a philanthropic motivation is just as valid in inference as a hostile one. Both represent at the least, speculation, and at the most, suspicion. The substantial credible evidence needed to label the layoffs as pretexturous and violative of Section 8(a)(3) has clearly not been shown.

THE DISCHARGE OF MARCELLUS VILCIUS

The Administrative Law Judge's finding of an 8(a)(3) violation for the discharge of Vilcius was based primarily on the fact that the employee's language barrier wss the same in June as it was when he was hired in September 1973. Accordingly, the inference was drawn that the employer's decision to reverse his position concerning the effect of the barrier must have therefore been pretexturous. The sufficiency of the inference however, is extremely questionable in view of the detailed reasoning advanced by Henry Accarino for Vicius' termination.

Henry Accarino testified that the language barrier

had caused minor problems all along. Vilcius' first job was extremely simple, and he was only taken off it five months later when the job was completed (A. 181). Moreover, even on the job, Henry Accarino stated that Vilcius kept complaining that the machine was no good. Henry Accarino stated he had to continually re-demonstrate the job to him (A. 182-183).

The second job given to him was also simple involving the use of a machine to bend handles which were to be placed in a barrel. On June 5, after bringing the handles to the shipping department, he poured the contents of handles into pre-counted boxes, thereby ruining the count in those boxes and causing the Respondent to re-count some 10,000 handles (A. 185-186). Henry Accarino related that the episode made him wary, and that the language barrier would one day result in a serious mishap (A. 187). The concern was a valid one under the circumstances.

Clearly the evidence providing a reasonable reason for discharge is substantial. It is uncontradicted in certain key particulars and reveals employer patience more than union motivated hostility. If the employer suspected him of union activity, he could have been laid off along with the others rather than being fired in connection with a specific incident of Vilcius' own making. Moreover, this employer was fired at a point in time when all the other laid off employees were re-called.

The cases clearly hold that in applying the

substantial evidence test the Court must consider all of the evidence including that in opposition to the Board's findings. UNIVERSAL CAMERA CORP. VS. N.L.R.B., supra. In this instance, such an application of the rule clearly demonstrates that the evidence in support of unlawful discharge is not substantial and therefore should be reversed.

THE DISCHARGE OF JOSE PIERETTI

Viewing all of the evidence in favor of as well as opposed to the Board's findings, demonstrates that Pieretti's discharge for job inefficiency was also valid and not pretexturous. The substantial credible evidence simply does not support a finding of a discharge motivated by union activity.

The record establishes a long line of job inefficiency and fear of machines supported not only be Henry Accarino's testimony, but by Pieretti's as well. The job of spot welder was a simple one (A. 192). All the machines were essentially the same (A. 192). Pieretti was on the job for two years. Clearly he should have been able to handle his job competently. Yet, he admits to a fear of machines (A. 148). He admits to turning out defective work (A. 141). He admits to producing lower quantities of a product when confronted with a new machine. There was uncontradicted testimony of Pieretti's failure to turn out more than eight or ten slack racks while others hired more recently turned out between 60 and 70 flat racks (A. 194-

196). There was ample testimony of his difficulty welding frame assemblies as well as the complaints of his co-workers with respect thereto (A. 198).

Under these circumstances, it is clear that Henry Accarino was not using Pieretti's two-day absence in July as a pretext for discharge. Rather, in this case, it was legitimately "the last straw". In the face of such strong testimony of inefficiency, substantial evidence on the record as a whole clearly does not support a finding of discharge motivated by union activity, especially in view of the time lapse between Local 455's demand for recognition and the date of Pieretti's discharge.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's Order should not be enforced and the Complaint dismissed.

Respectfully submitted

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

GENERAL IRON CORP.,

Respondent.

US COURT OF APPEALS — Court Division
2nd CIRCUIT
Docket # 75-4242

CROSS PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Sat Below:

CERTIFICATION

On April 2, 19 76, *I, the undersigned, being of full age did deliver to Lawyers Service or mail by regular mail for service on:*
CLERK OF THE US COURT OF APPEALS FOR THE 2nd CIRCUIT, FOLEY SQ., NEW YORK, N.Y.
and: Elliot Moore, Deputy Assoc., Gen. Counsel, National Labor Relations board, Washington, D.C. 20570: Steven E. Appell, National Labor Relations Board Region 29, 16 Court Street, Brooklyn, New York 11241: Brian O'Dwyer, O'Dwyer and Bernstein, 63 Wall Street, New York, N.Y.: Sipser, Weinstock, Harper & Dorn, 380 Madison Avenue, New York, New York

15 *copies of* Brief for General Iron Corp.
to the Clerk of the US Court of Appeals for the 2nd Circuit and 2 of *same to each of the following:*

Elliott Moore: Steven E. Appell: Brian O'Dwyer: Sipser, Weinstock, Harper & Dorn

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

DATED: April 2, 1976

Allan A. Horwitz